Filed 9/30/03 In re Ivy W. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re IVY W., a Minor.	
RICHARD C., Petitioner and Appellant, v. IVAN W., Objector and Respondent.	E032613 (Super.Ct.No. RIA 16841) OPINION

APPEAL from the Superior Court of Riverside County. Stephen D. Cunnison, Judge. Affirmed.

Jack Michael Pilson for Petitioner and Appellant.

Carmela F. Simoncini and Appellate Defenders, Inc. for Objector and Respondent.

Harry Zimmerman, under appointment by the Court of Appeal, for Minor.

1. Introduction

Richard C. (stepfather) filed a petition to declare his stepdaughter, Ivy W., free from the parental custody and control of her biological father, Ivan W. (father). In

challenging the trial court's order denying his petition, stepfather claims the court made the following errors: failed to apply the evidentiary presumption set forth in Family Code section 7822, subdivision (b);[1] relied on irrelevant evidence; failed to consider the child's interest and wishes; and failed to consider the probation officer's report. Stepfather also claims the probation report was deficient as a matter of law.

We conclude the trial court correctly applied section 7822 in finding that father did not have the requisite intent to abandon his child. We also conclude that any failure by the court to consider other items of evidence was harmless under the circumstances. We affirm the trial court's order.

2. Factual and Procedural History

Mother and father were married on November 28, 1992. They lived in Maryland, where father was stationed in the Army. During their short marriage, mother gave birth to Ivy in February 1994.

One month after Ivy's birth, mother left father and moved with Ivy to her mother's home in Perris, California. Mother filed for divorce.

Later that year, when father discovered that Ivy needed stomach surgery, father flew out to California to be with his daughter during her procedure. Father visited Ivy again in March of 1995 and February of 1996. At the time, father was able to pay $150 per month in child support from his military salary.

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[1] All further statutory references will be to the Family Code unless otherwise stated.

The divorce became final on May 24, 1996. Mother sought and was granted a default judgment against father. The judgment did not grant father any rights to custody or visitation. The judgment, however, required father to pay $300 a month in child support.

Mother married stepfather on June 26, 1996. After their marriage, they lived with stepfather's mother in Nuevo, California. Mother filed a change of address with the family court listing the Nuevo address. Six months later, they moved to Georgia, where stepfather was stationed with the Marines. In August of 1997, mother and stepfather returned to Nuevo, California. After another period of about six months, the family moved to Murrieta, California.

Shortly after his discharge from the army on January 5, 1996, father moved to California. By this time, father was no longer able to pay child support. He lived in various places and was often unemployed. Although he worked for a couple of years, he suffered a work-related injury in 1998. As a result of his injury, father was again unemployed and unable to work.

On October 12, 1998, during a chance meeting, stepfather, who was in a car with mother and Ivy, encountered father, who was crossing the street. During that meeting, father attempted to make contact with Ivy, but mother told him that he could not see her without a formal request for visitation.

From March of 2001 to April of 2002, father was incarcerated in state prison. Upon his release, father moved into his parents' home in Perris, California.

Father had not paid child support from August of 1995 to July of 2002. Beginning in July of 2002, the district attorney's office began to garnish father's wages for his child support payments.

On March 26, 2001, stepfather filed a petition to declare Ivy free from father's custody and control. At the hearing on stepfather's petition, the court found that, while father failed to pay child support or communicate with mother, he did not intend to abandon his child. The court also found that mother's conduct discouraged father from maintaining contact with Ivy. The court therefore denied stepfather's petition.

3. Intent to Abandon

Stepfather claims that insufficient evidence supported the court's finding that father did not intend to abandon his child within the meaning of section 7822. Stepfather specifically argues that father failed to rebut the evidentiary presumption in section 7822, subdivision (b). Stepfather also claims that, while the court based its decision on irrelevant evidence (i.e., evidence of mother's conduct), the court failed to consider other relevant criteria (i.e., child's best interest, child's wishes, and the probation officer's report).

Section 7822 provides in part:

"(a) A proceeding under this part may be brought where the child has been left without provision for the child's identification by the child's parent or parents or by others or has been left by both parents or the sole parent in the care and custody of another for a period of six months or by one parent in the care and custody of the other

parent for a period of one year without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child.

"(b) The failure to provide identification, failure to provide support, or failure to communicate is presumptive evidence of the intent to abandon. If the parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent or parents."

Under section 7822, the party seeking a declaration of abandonment must prove that the offending parent intended to abandon the child.[2] Abandonment is defined as "'an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation and throw off all obligations growing out of the same.'"[3]

Section 7822, subdivision (b), sets forth the statutory presumption of abandonment where the parent has failed to provide support or communicate with the child. The court may not find that a parent has failed to provide support where that parent has lacked the ability to do so.[4] However, the failure to provide support, regardless of the parent's

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[2] See *In re Daniel M*. (1993) 16 Cal.App.4th 878, 886; see also *In re Marriage of Dunmore* (2000) 83 Cal.App.4th 1, 5; *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1315.

[3] *In re Daniel M., supra*, 16 Cal.App.4th at page 882.

[4] See *In re Randi D*. (1989) 209 Cal.App.3d 624, 630, citing *Guardianship of Pankey* (1974) 38 Cal.App.3d 919, 932.

ability to pay, combined with a failure to maintain contact with the child would justify a finding of abandonment.[5]

The determination of whether a parent has abandoned his child is a question of fact.[6] As the finder of fact, the trial court must make this determination by clear and convincing evidence.[7] The court need not rely on the parent's stated intent, but may consider other objective measurements or circumstantial evidence of the parent's conduct.[8] In making this determination in a case where the parent has failed to support and communicate, the court must decide whether the parent has overcome the presumption of abandonment. To overcome the statutory presumption, the parent must make more than token efforts to communicate with the child.[9] Additionally, the parent's efforts should reveal a genuine desire to maintain the parental relationship.[10]

Once the trial court makes its determination under section 7822 by clear and convincing evidence, a reviewing court must uphold the court's finding if supported by

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[5] *In re Randi D., supra*, 209 Cal.App.3d at page 630.

[6] *In re B.J.B.* (1986) 185 Cal.App.3d 1201, 1212.

[7] *In re B.J.B., supra*, 185 Cal.App.3d at page 1211.

[8] *In re B.J.B., supra*, 185 Cal.App.3d at page 1212; see also *In re Bisenius* (1959) 173 Cal.App.2d 518, 521-522.

[9] *In re B.J.B., supra*, 185 Cal.App.3d at page 1212.

[10] See *In re. B.J.B., supra*, 185 Cal.App.3d at page 1212.

substantial evidence.[11] Under the substantial evidence test, the court must consider the entire record in the light most favorable to the judgment and determine whether it contains substantial evidence—i.e., evidence that is reasonable, credible, and of solid value—to support the court's finding.[12] The court must disregard every fact contrary to the judgment and must presume the truth of every fact supporting the judgment that can be reasonably deduced from the evidence.[13]

Stepfather claimed that father failed to pay child support from August of 1995 to July of 2002. As the court found, father left the child without provision for support and without communication. Thus, the presumption of abandonment would have applied had father not presented substantial evidence to rebut the presumption.[14] To overcome the presumption of abandonment, the evidence must show that father was unable to pay child support during that seven-year period. The evidence also must show that father did not fail to maintain contact with his child.

In finding that father did not intend to abandon his child, the trial court relied largely on father's testimony. As a reviewing court, we must defer to the trial court's

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[11] *In re B.J.B., supra*, 285 Cal.App.3d at page 1211; see also *People v. Ryan, supra*, 76 Cal.App.4th at pages 1312-1313.

[12] *People v. Ryan, supra*, 76 Cal.App.4th at page 1313.

[13] *People v. Ryan, supra*, 76 Cal.App.4th at pages 1313, 1316.

[14] See *In re Rose G.* (1976) 57 Cal.App.3d 406, 419 (discussing rebuttable presumption of abandonment in former statute, Civil Code section 232, subdivision (b).)

resolution of evidentiary conflicts and determinations on the credibility of witnesses.[15] Father testified that he paid $150 per month in child support, as ordered by the court, until he was discharged from the Army in January of 1996. Father testified that, through the district attorney, he also gave mother $625 for housing. After being discharged from the Army, father moved to Lake Elsinore, California. Father was unemployed and, therefore, was unable to pay child support.

At this time, father knew that mother and Ivy were living with the maternal grandmother in Perris, California. Father went to the maternal grandmother's house to visit the child. On occasion, mother would bring the child to father for a visit. However, after mother remarried, she moved out of the maternal grandmother's home. When father attempted to contact mother, the maternal grandmother told father that mother no longer lived at that address and "shut the door on [his] face." For a brief period, mother and stepfather lived with stepfather's mother in Nuevo, California. They later moved to Georgia. When they returned to California, mother and stepfather lived temporarily in Nuevo and then settled in Murrieta, California. Father never received notice of mother's whereabouts.

Father tried to locate mother but without success. On several occasions, father returned to the maternal grandmother's house. Father tried to contact mutual friends.

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[15] *In re Marcos S.* (1977) 73 Cal.App.3d 768, 781.

Father looked in the phone book and searched the internet. Father also contacted the Father's Rights Advocacy organization and the district attorney's office.

In 1988, Father shattered his arm from the middle of his forearm to the knuckles of his hand. After the accident, father was unable to work and had no source of income. From March of 2001 to April of 2002, father was also unable to pay child support because he was incarcerated at a correctional facility.

"It is well established that the failure of a parent to support his child is not grounds for depriving him of custody in the absence of evidence that he had the ability so to do."[16] Between January of 1996 and July of 2002, father was often unemployed, disabled, and, for one year, incarcerated. The record, however, is unclear as to whether father was employed during some of all of the time between March of 1996 to October of 1998. Nevertheless, father indicated that he did not send any checks for child support because he did not have mother's address.

The record also shows that father made efforts to contact his child. Stepfather claims that father easily could have discovered mother's whereabouts by filing a request with the family court. Father testified however that, because he was unemployed, he could not afford the filing fee and he was unaware of any fee waiver programs.

Rather than finding father at fault, the trial court found that mother deliberately discouraged father from communicating with his child. Although stepfather claims that

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[16] *Guardianship of Pankey, supra,* 38 Cal.App.3d at page 932.

mother's conduct was irrelevant, we find the evidence highly probative to show that any failure to communicate was not the result of father's lack of efforts, but the result of mother's evasive conduct. While mother's conduct may not excuse father from his obligation to pay child support,[17] mother's conduct may explain father's inability to maintain contact with the child.[18] Conduct by mother and her family can be characterized as "openly hostile and uncooperative" (i.e., maternal grandmother's act of slamming the door on father; mother's family's refusal to inform father of mother's whereabouts; and mother's conduct on October 12, 1998, including her comment that "[Ivy] is not your daughter").[19]

Furthermore, it was mother who took Ivy and left father in Maryland. After moving to California, mother had a default judgment entered against father that contained no provision for formal visitation. While father visited Ivy informally, his visitation ended abruptly when mother moved out of maternal grandmother's house. Mother moved about three additional times. On only one occasion, however, mother notified the family court of her new address.

While the record indicates that father's efforts were neither exhaustive nor effective, the record supports the court's finding that father did what he believed was

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[17] See *In re Marriage of Damico* (1994) 7 Cal.4th 673, 681-682.

[18] *In re Allison H*. (1991) 230 Cal.App.3d 154, 161.

[19] *In re Allison H., supra*, 230 Cal.App.3d at page 161.

within his means to do. The court impliedly found that father made genuine and substantial efforts, as opposed to merely token efforts, to communicate with his child. Even if another court would have reached a different result under the same circumstances, we cannot second-guess the trial court's factual findings.[20]

Substantial evidence supported the trial court's finding that stepfather failed to prove that father intended to abandon his child. A determination of whether a parent intended to abandon his child is not made lightly. At stake is a parent's fundamental interest in the care, custody, and companionship of his child.[21] Without finding an intent to abandon, the court cannot sever the parental relationship.

Stepfather nevertheless claims that the court failed to consider Ivy's wishes and interests. While the court must consider the child's wishes and act in the child's best interest,[22] the record is silent as to whether the court complied with this requirement. When faced with a silent record, we must presume that the court followed the law.[23] We note that, based on Ivy's age, the court was not under any mandatory duty to conduct an

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[20] See *In re Allison H., supra*, 230 Cal.App.3d at page 161.

[21] *In re Daniel M., supra*, 16 Cal.App.4th at page 885; *In re Cheryl E.* (1984) 161 Cal.App.3d 587, 606.

[22] See Family Code section 7890; *In re Marcel N*. (1991) 235 Cal.App.3d 1007, 1014.

[23] *In re Baby Boy S.* (1987) 194 Cal.App.3d 925, 933.

interview.[24] Moreover, "[a]bsent intent on the part of the parents to abandon the child, as the court found here, the best interests and welfare criteria are simply not applicable."[25] The inquiry under section 7822 is not whether the child would be better off with the adoptive parent, but whether the biological parent has demonstrated an intent to abandon his child.[26] While the child's best interest is always a consideration in these proceedings, it is not an overriding consideration when there is no finding of abandonment and, hence, no justification to sever the parent's fundamental interests in the care, custody, and companionship of his child.

Under two separate headings, stepfather also claims both that the trial court failed to read and consider the probation officer's report in rendering its judgment, and that the report itself was inadequate.[27] Stepfather failed to preserve his claims for appeal by raising an objection during the hearing. An objection below would have allowed the court to easily procure a copy of the report for the record.[28]

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[24] See Family Code section 7891.

[25] *In re Baby Boy S., supra,* 194 Cal.App.3d at page 933; see also *In re Daniel M., supra*, 16 Cal.App.4th at page 886.

[26] *In re Bisenius, supra*, 173 Cal.App.2d at page 522.

[27] Section 7851.

[28] See *People v. Brown* (2001) 96 Cal.App.4th Supp. 1, 38.

There is also no indication that the technical error (i.e., the court's failure to admit the report into evidence) resulted in a miscarriage of justice.[29] Although the report was not admitted into evidence, nothing in the record suggests that the court did not read and consider the report. On the contrary, the record includes a copy of the probation officer's supplemental memorandum. In that memorandum, the probation officer noted that "[a] complete report was submitted" in this case.

Additionally, stepfather does not specify how any of the deficiencies in the report would have affected the court's decision on the pivotal question of abandonment. Most of stepfather's complaints concern the probation officer's failure to report on the child's feelings, thoughts, attitudes, and condition. These factors shed light on the child's wishes and best interest. Under the circumstances in this case, these factors would not have affected the outcome.[30] As one court aptly noted, "While [the parents] are not role models as parents, they have not abandoned the child, and its welfare and best interests are thus not relevant to the abandonment issue."[31]

In sum, we conclude that substantial evidence supported the trial court's finding that father did not intend to abandon his child. We also conclude that any failure by the

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[29] See California Constitution, article VI, section 13; see also *In re Angelia P.* (1981) 28 Cal.3d 908, 926; *In re Richard E.* (1978) 21 Cal.3d 349, 355.

[30] See *In re Baby Boy S., supra*, 194 Cal.App.3d at page 934.

[31] *In re Baby Boy S., supra*, 194 Cal.App.3d at page 934.

court to consider other evidence pertaining to the child's wishes and the child's best interest was harmless in light of the court's finding.

4. Disposition

We affirm the trial court's order denying stepfather's petition.

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s/Gaut
J.

We concur:

s/Ward
Acting P. J.

s/King
J.